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Book Review (reviewing Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960))

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This is, indeed, the seeming true measure of the book's contribution. One might hesitate to say what it means for jurisprudence in the sense of legal philosophy and the speculations of that branch of knowledge about the ultimate nature and sources of law. If a book is to be judged, as it should be, by its explicit intentions as to accomplishment, there is no occasion to appraise its significance for purposes it expressly disclaims. It did not set out to do more than to reassure the average lawyer about the importance of craftsmanship in the little case as well as the big, to reaffirm the average lawyer's belief in his own professionalism. That, it goes without saying, is no inconsiderable objective; indeed, it is hard to envisage a more exalted one.

No lawyer can work effectively without pride, without conviction that means do shape ends, and that intelligence and imagination and industry do affect results. To restore that pride and conviction where they have been lost, to reinvigorate them where they have lagged, to identify and to articulate them where they flourish in a natural state—all these surely make Professor Llewellyn's work a professional landmark of major importance, a structure of those Gothic proportions which are so much to Professor Llewellyn's own taste.

This is a book of great sophistication and no cynicism. Of such are the true craftsmen of this world in all trades. Those of the law will read and return to it with recognition and profit for a long time to come.

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A TEACHER'S VIEW

*Let us now peruse our ancient authors, for
out of the old fields must come the new corn.*

—SIR EDWARD COKE

This book is pure, unadulterated Llewellyn. No more need be said. Indeed, no more would be said except that the demands of a law review editor are not so easily satisfied: the lily must be gilded and the refined gold must be painted, so that insight may be obscured and truth perverted.

How then to describe this valedictory effort of The Great Llewellyn? It is youthful in its exuberance. It explodes with ideas: some good, some bad, some new, some old. It is fascinating in its juxtaposition of words which, on occasion, appeal more to the ear than to the mind. It is egocentric in its emphasis on the first person singular. The reader is admonished in the language of Cromwell: "My brethren, by the bowels of Christ I beseech you, bethink you that you may be mistaken." But, as with Cromwell, the command is always outward never inward. Finally, there is a mystique, impossible

of description, that fills in the gaps of logic and history. All these things add up to the strange charm that enchants so many.

The extent of the charm is attested by some of the nation's ablest high state court judges: Fuld of New York, Kennison of New Hampshire, Schaefer of Illinois, and Traynor of California. Their testimonials to the greatness of the book have been endorsed by renowned teachers of law, such as Dean Prosser, and eminent barristers, like Carl McGowan. This unanimity of applause would make it somewhat embarrassing for anyone to admit publicly that the great messages of the book do not come through to him with the same force and clarity. For the chances are that the emperor is fully and magnificently clothed and that the cry of nakedness would reflect more on the inadequacies of the crier's mental capacities than on those of the royal couture. I, therefore, do not assert the absence of clothing, I propose only to make some remarks to suggest that one of us may be missing no more than a few buttons.

First, I should say that the book, allegedly constructed on the parallel to Gothic sculpture or Gothic glass, appears to me more in the mode of a Dali painting. For there are some things within it that are perfectly comprehensible to me, but the reasons for bringing them together on the single canvas elude me. The one major theme that even I could not have missed is that there is great predictability in the decisions of our high state courts. It is not a theme that I find novel. What is novel is the method of proof to demonstrate the proposition. Some dozen or so amorphous, undefined and undefinable criteria are asserted as factors to be taken into consideration in anticipating the conclusion to be reached by a court in any given case. I fear that the multiplication of variables by each other can only make uncertain that result which can now reasonably be anticipated by counsel who have examined the case for presentation to the court without the assistance of the standards here proffered. And I believe that the Llewellyn factor analysis is more accurate retrospectively than prospectively. But it may also be that Llewellyn has made explicit that which good lawyers have implicitly understood heretofore. I must remind the reader that mine is the view of an academic, far removed from the business of the courts that have been the object of Llewellyn's researches. I am, therefore, not so good a judge of the utility of the Llewellyn analysis as McGowan, whose business it is to anticipate the decisions of these courts, or Schaefer, whose business it is to render these judgments as part of his daily chores. And both of these worthies—as you can read for yourself—have endorsed the value and authority of the Llewellyn analysis.

This distinction between the practitioner and the academic brings me to the second point I should like to make. Llewellyn takes umbrage at those in the academic world who look down their noses at the occupants of the state court benches and devote their time to telling these benighted and berobed gentlemen how they should have conducted their affairs. For him this is evidence of an unjustified snobbery resulting from the fact that those exercis-

ing the roles of critics fail to take into account the practicalities as well as the doctrinal significance of the problems presented to the court. It may be that this is another attempt by Llewellyn to bring the occupant of the ivory tower down to the mud of reality and no more. Or it may be, as I read it, that Llewellyn is once again preaching his doctrine of tolerance for mediocrity. After one says, as Llewellyn does, that we have no basis for imputing dishonesty to our state court judiciaries, is there more to be said for them as a group? Certainly there are Fulds and Kennisons and Schaefer and Traynors, who would grace any bench. (I would note that of these, two ascended the bench directly from the groves of academe.) But for the most part it cannot be denied—and this is certainly true in the two jurisdictions that Llewellyn and I know best: New York and Illinois—that intelligence and appropriate legal experience are, at best, accidental factors in the appointment or election of the judiciary. Where the judicial posts are regarded as political rewards and, to some extent, as sinecures for ward-level political service, it cannot be mere snobbery for law teachers to demand better. It is one thing to demand of the teaching profession that they recognize the realities of legal problems as they are presented to the courts; it is still another to say that these realities do and should include judges who could not qualify for graduation at any of our first-rate law schools. Mediocrity of our judiciary is indeed a fact that we must notice; it is not one that we must admire.

This brings me to the third and last point that I wish to make here. In view of the fact that the book might be appropriately subtitled: "In Praise of Judges," it is further and ample evidence of the current trend among realist jurisprudes, of whom Llewellyn is the self-proclaimed leader with a large following. In the 1930's the new jurisprudence, derived from Austin, Holmes, and Cardozo, led the way in the demotion of the judiciary from the high estate of grace it then held: it made men of gods. The realist jurisprudence thus contributed to the transfer of effective law-making power from the bench to the legislature and executive, and more particularly to the latter in the form of administrative agencies. The very leaders of this group who once regarded the notion of the supremacy of the judiciary as anathema are now in the forefront of the movement to restore the judiciary to its place of power. The pendulum has completed its arc and is now being hurried in its return. This is noticeable in the realm of public law as the critics of the Supreme Court in the '30's rally to the Court's defense today. Llewellyn's book demonstrates that the movement is more pervasive and is intended to include the common-law courts in the restoration movement as well. And the volume is a superb example of putting jurisprudential doctrine to political ends: a pragmatic utilization of academic tools.

Looking back over these niggling remarks, I am reminded of Emerson's advice to Holmes after the latter had proudly produced an essay critical of Plato: "I have read your piece. When you strike at a king you must *kill* him."

Holmes had the excuse of youth; I have none. And so I, too, must join the chorus who speak of Llewellyn as T. S. Eliot does of one of his practical cats, Mr. Mistoffelees:

“And we all say: OH!
Well I never!
Was there ever
A Cat so clever
As magical Mr. Mistoffelees!”

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Mr. Justice Black, the Supreme Court, and the Bill of Rights. By CHARLES L. BLACK, JR. *Harper's Magazine*, February 1961, p. 63.

In a recent article in *Harper's Magazine*, Professor Charles Black sought to explain and buttress Mr. Justice Black's position on the Bill of Rights. The argument is so new and appealing—its implications with respect to the judicial process are so provocative—as to invite consideration in a learned journal. Since Professor Black wrote in broad and non-professional terms, it seems appropriate to respond in kind.

No past or present Justice, and no responsible commentator, has ever suggested that the Bill of Rights gives an absolute right to say whatever one might choose to say at any time and any place. To quote Professor Black, “No one would argue, for example, that . . . ‘free speech’ . . . includes mere personal slander, or fraudulent oral misrepresentation of goods offered for sale, or perjury on the witness stand. . . .” or (in Holmes' famous phrase) shouting “fire” falsely in a dark and crowded theater. It follows then, that in close cases the essence of the judicial function is to balance conflicting interests in the context of the circumstances in which they clash. This is what the Court purports to do, and what Professor Black agrees it must do. His point (bluntly put) is that the Court should insist (pretend?) that free speech is an absolute—while it does the inevitable balancing by manipulating the definition of “free speech.” Professor Black admits that “in a *purely logical* sense” it really makes no difference which approach is used. In either case “free speech” gets balanced off against more mundane interests. We must look, then, for an extra-logical—perhaps irrational—justification for the unorthodox position. Its value is said to be psychological: “what is really on the scale is attitude.” A judge who talks in terms of absolutes (even though with tongue in cheek) reveals a more reliable attitude, it seems, than one who makes no bones about what he is doing, who balances openly and not under the guise of defining.

Of course, Professor Black has no sympathy for subterfuge and he knows